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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 706

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MACKAY RADIO & TELEGRAPH COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 17–48) are reported in 1 N. L. R. B. 201. The opinions of the Circuit Court of Appeals on the original hearing (R. 62–104) are reported in 87 F. (2d) 611. The opinions on rehearing (R. 113–123) are reported in 92 F. (2d) 761.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 19, 1937. The petition for a writ of certiorari was filed on January 15, 1938,

and was granted on February 28, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether men on strike because of failure of negotiations concerning wages and terms of employment are employees, within the meaning of the National Labor Relations Act.

2. Whether it is an unfair labor practice, forbidden by the National Labor Relations Act, for an employer to discriminate because of union activities in the reinstatement of men who have gone on strike because of failure of negotiations concerning wages and terms of employment, and whether the Act authorizes the National Labor Relations Board to order the reinstatement to positions of employment of persons so discriminated against.

3. Whether the National Labor Relations Act, construed so as to authorize the Board to require the reinstatement of such persons to positions of employment, violates the Fifth Amendment.

In addition to these questions, which were presented in the petition for writ of certiorari, respondent has raised, and may press, the questions:

4. Whether the Board's finding that respondent refused to reinstate certain of its employees be-

cause of their union activity is supported by evidence.

5. Whether the petition for writ of certiorari was filed in time.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 *et seq.*) are as follows:

> SEC. 2. When used in this Act—
>
> (3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.
>
> (9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment * * *.
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

SEC. 10.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals * * * for the enforcement of such order * * *. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive * * *.

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

STATEMENT

Upon written charges duly filed by American Radio Telegraphists' Association, San Francisco Local No. 3, a labor organization, the Board, on November 9, 1935, issued a complaint and notice of hearing, which were duly served upon respondent (R. 1–5). The complaint, in so far as material here,* alleged that respondent was engaged at its San Francisco and other offices in the receipt and transmission by telegraph, radio, and cable of communications in interstate and foreign commerce; that in the course of such business respondent, by discrimination in regard to the tenure of employment of certain named operators employed at its San Francisco office, by reason of said employees' membership in and assistance of Local No. 3, did discourage membership in the union, and thereby committed unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (3), of the National Labor Relations Act (R. 2–5).* Respondent duly filed its answer, wherein it did not deny the allegations with respect to the nature of its business but did deny those relating to the unfair labor practices (R. 6–9). On December 16, 1935, the Board issued an amended complaint pursuant to Section 10 (b) of the Act,

* The complaint also alleged that respondent had violated Section 8 (2) of the Act (R. 4). With respect to these allegations the Board dismissed the complaint without prejudice.

changing the complaint in several minor particulars in order to conform it to the proof (R. 7–9; 858–859, 900–901).

A hearing was held at San Francisco before a trial examiner duly designated by the Board and continued, with adjournments, from December 2 to December 20, 1935 (R. 125–1093). Respondent, at the outset, moved to dismiss the complaint on constitutional grounds (R. 127–29). Decision on this motion was reserved (R. 132). Respondent then availed itself in full measure of the opportunity afforded to examine and cross-examine witnesses and to adduce evidence on its behalf. After the evidence had been presented on both sides, but before oral argument before the examiner (R. 1092–1093) the proceeding was transferred by order of the Board and continued before it in Washington (R. 10). The Board thereafter denied a motion made by respondent to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report (R. 10–14).[1] Oral argument

[1] In the court below respondent assigned error to this ruling (R. 57, paragraph X, 3; X, 8). The usual practice of the Board is to permit the trial examiner to file an intermediate report and in such case, on request by respondent, to hear argument upon exceptions to that report. It is clear, however, that occasional departures from this practice—more frequently necessary in the first year of the Act's administration than thereafter—raise no question of infringement of statutory or constitutional right. *Morgan* v. *United States*, 298 U. S. 468, 478. Respondent's answer in the court below states (R. 55–56), and the record establishes (R. 14, 18) that oral argument was had before the Board upon exceptions to the rulings of the trial examiner.

was held before the Board itself in Washington. The respondent filed exceptions to the trial examiner's rulings, and a brief in support of its position (R. 14–17).

On February 20, 1936, the Board issued its findings of fact, conclusions of law, and order (R. 17–48). The Board found,[2] in substance, that respondent operated a system for the receipt and transmission by telegraph, radio, and cable of communications in interstate and foreign commerce (R. 18–19). Beginning in June 1935 the American Radio Telegraphists' Association (the A. R. T. A.) attempted to negotiate general agreements with respondent concerning the wages and working conditions of its radio operators (R. 20). After these negotiations had continued for several months without success, the San Francisco local of the A. R. T. A., to which the men here involved belonged, authorized the national officers conducting the negotiations to call a strike if the respondent did not execute the agreements by September 23, 1935 (R. 20–21). Pursuant to this authorization and because of the unsatisfactory state of the negotiations, a strike was finally called by the negotiators on October 4, 1935 (R. 21). The strike was unsuccessful, and by October 7 the men were willing to return to work (R. 21–22). The officials of

[2] The evidence in support of such of the Board's findings as have been challenged by respondent will be discussed in detail in the appropriate point in the argument. (See pp. 29–31, 54–67, *infra.*)

the company agreed to let all the men return at once, except those on a list of eleven who were required to apply for reinstatement to the central office in New York (R. 23). The company's claim was that it had brought eleven men to San Francisco during the strike who might desire permanent jobs there (R. 28–29). The eleven men not immediately reinstated included five who were admittedly inefficient (R. 33–34), a supervisor who was also a member of the union (R. 27–28), and five men who were among the best of the company's operators but who were also the leaders of the San Francisco local of the A. R. T. A. (R. 28, 34). The company refused to reinstate any of the five men last mentioned (R. 24, 27)[3] (although all except one of the inefficient employees were quickly taken back, without submission of an application to New York) (R. 24, 30, 32, 33–36). The Board found that four of these five employees had been refused reinstatement in order to discourage membership in the A. R. T. A., and that this conduct on the part of respondent constituted discrimination in regard to hire or tenure of employment in violation of Section 8, subdivisions (1) and (3) of the Act (R. 36, 46–47). In addition the Board

[3] Palmer, Rone, Bash, Loudermilk, and Salisbury. No complaint was made as to Salisbury (R. 2–4). Salisbury, who was on leave at the time of the strike, asked at the end of his leave to return to work, and was refused (R. 998–1000); but in the charge filed with the Board his discharge was not made a basis for complaint (R. 2–4). See pp. 57–58, *infra*.

found that another employee, Phelps, who was not on the original list of eleven, was refused reinstatement because of his membership in the A. R. T. A., and that this action also violated the same provisions of the Act (R. 36–39, 46–47).

Upon the basis of these findings the Board ordered respondent to cease and desist from discharging or threatening to discharge any of its employees because they joined or assisted the union or otherwise engaged in union activities; and from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization and collective bargaining (R. 47). The Board's order further required respondent to offer full reinstatement, with back pay, to the five employees unlawfully discriminated against, and to post appropriate notices (R. 47–48).

In March 1936 the Board, pursuant to Section 10 (e) of the Act, petitioned the Circuit Court of Appeals for the Ninth Circuit for enforcement of the foregoing order (R. 51–54). On January 11, 1937, the court first denied the Board's application (R. 104). Three opinions were handed down (R. 62–104).

Circuit Judge Wilbur held that although "the Board was acting well within the power Congress sought to vest in it" (R. 86, 83–84) in ordering the reinstatement of the five employees, the grant of power violated the due process clause as interpreted in *Adair* v. *United States*, 208 U. S. 161, and

Coppage v. *Kansas*, 236 U. S. 1 (R. 82–84). He also held that, in so far as the Act authorized the award of back pay without jury trial, it contravened the Seventh Amendment (R. 89).

Circuit Judge Mathews, concurring with Judge Wilbur in result, found it unnecessary to pass upon the constitutional question (R. 89). His position was that the statute defined employees as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute," and that there was no allegation, evidence or finding that the strike in this case was a "current labor dispute" (R. 90). He accordingly concluded that the men on strike were not employees within the meaning of the Act, and that the conduct of respondent toward them could not violate the Act (R. 91). Although he recognized that the strike had been called because of the unsatisfactory state of the negotiations (R. 90), he appears to have construed the phrase "current labor dispute," as used in the statute, as not including such a strike.

Circuit Judge Garrecht dissented (R. 92–104). Agreeing with Judge Wilbur that the Board's action was clearly authorized by the statute, he held that the Act did not in any way violate the Constitution, and that the order should be enforced.

The order of the Circuit Court of Appeals was entered on January 11, 1937 (R. 104). On February 9, at the same term of court and within the thirty days required by the court's rules, the Board

filed a petition for leave to adduce additional evidence and for rehearing (R. 105–107). On April 23 the Circuit Court of Appeals heard oral argument on this motion and gave the parties additional time to file briefs (R. 108). On May 10, before the court had acted on the petition for rehearing and before the end of the term, the Board filed a motion for leave to file a supplement to the petition, together with the proposed supplement, calling the court's attention to the decisions of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases (R. 108–111). On May 17 the Circuit Court of Appeals granted the petition for rehearing, and the case was reargued on June 14, 1937 (R. 112).

On October 19, 1937 the court denied the Board's application for enforcement of its order, each judge again stating his views in a separate opinion (R. 113, 119, 124). Judge Mathews adhered to the views expressed in his former opinion (R. 119). Judge Wilbur, who had previously declared that the statute clearly authorized the action of the Board, now changed his position. Although explicitly stating that Congress intended the Act to apply to employees on strike in the circumstances at bar, he considered that to require the reinstatement of such employees would be to compel the employer to make new contracts of employment, and that this would be unconstitutional in the light of the *Adair* and *Coppage* cases and of the lan-

guage of this Court in the *Jones & Laughlin* case (R. 118). Accordingly, he held that the statute "properly construed in the light of the Constitution" did not warrant the Board's order (R. 119). In a second dissenting opinion (R. 119–123), Judge Garrecht set forth his reasons for disagreeing both with Judge Wilbur and with Judge Mathews.

The court's judgment denied enforcement to all the provisions of the Board's order (R. 124).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that it is an unfair labor practice for an employer, in selecting persons for reinstatement after a strike, to discriminate among them because of their union activities.

2. In not holding that the National Labor Relations Act authorizes the National Labor Relations Board to order that the persons discriminated against shall be reinstated to positions of employment.

3. In not holding that persons who have ceased work in consequence of a strike called because of the failure of negotiations concerning wages and conditions of employment are "employees" within the meaning of the National Labor Relations Act.

4. In not holding that a strike called because of the failure of negotiations concerning wages and conditions of employment is a "current labor dispute" within the meaning of the National Labor Relations Act.

5. In not holding that the Act, construed so as to authorize the Board's order, did not violate the due process clause of the Fifth Amendment.

6. In refusing to enforce the Board's order as valid and supported by the evidence and the findings.

SUMMARY OF ARGUMENT

I. The Board found and the evidence shows that in reinstating striking employees after an unsuccessful strike the respondent discriminated against union members solely because of their union activity. Such conduct constitutes an unfair labor practice forbidden by Sections 8 (1) and 8 (3) of the National Labor Relations Act, and the Board is empowered to order respondent both to cease and desist from such unlawful practices and to reinstate the employees unlawfully discriminated against. The express language of the statute demonstrates that persons on strike are within its protection. "Employee" is defined by Section 2 (3) of the Act to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." "Labor dispute" is defined in Section 2 (9) to include "any controversy concerning terms, tenure or conditions of employment."

Respondent and Judges Mathews and Wilbur in the Circuit Court of Appeals have advanced various reasons why the statute should not be construed to mean what it says. None of these reasons was

accepted by more than one of the judges of the court below; all are plainly unsound.

A. Judge Mathews held that the strikers were not employees within the statutory definition because they did not cease work in connection with a "current labor dispute." The Board's finding and the evidence show that the employees went on strike because of the failure of negotiations with respect to an agreement concerning wages and working conditions. How it can be argued that such a strike is not a labor dispute—especially when labor dispute is defined in the Act to include "any controversy concerning terms * * * of employment"—it is impossible to discern. There is no basis for respondent's contention that the strike in San Francisco, where the unfair labor practices occurred, was merely a sympathetic one; the agreement which the employees were seeking concerned wages and working conditions for the entire Mackay system, including, of course, the San Francisco office.

B. Adopting an objection first advanced by Judge Mathews, respondent contends that "the amended complaint failed to allege a jurisdictional requirement, to-wit, that the men named in the complaint were employees as defined in the Act." The answer to this contention is twofold. First, the complaint clearly was specific enough to apprise respondent fully of the charges against it. Secondly, respondent never urged before the Board that the complaint was defective in this re-

spect; and under Section 10 (e) of the Act such an objection cannot now be considered by the court, in the absence of extraordinary circumstances.

C. Judge Wilbur in his second opinion held that the word "reinstatement," as used in Section 10 (c) of the Act, only authorized the Board to order the reinstatement of an employee to the position which he occupied at the time of the unfair labor practice. In the case of persons on strike at that time, he held, this would mean reinstatement to the position of a striker (even though the strike was over) and not to a position of employment. It is plain, however, that Congress intended the phrase "reinstatement of employees" to mean reinstatement to the employees' former jobs, and did not contemplate the futility of restoration to a meaningless status.

D. Judge Wilbur deemed this forced construction necessary to save the constitutionality of the Act. He was of opinion that to require the reinstatement of strikers would be to compel respondent to enter into a new contract of employment, and that this would violate the due process clause as interpreted in *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1. But even under the preexisting common law it has frequently been held that a strike does not terminate the relation of employer and employee; the reinstatement order merely requires that a relationship which has not been entirely severed be actively resumed.

Even if the order of reinstatement be regarded as directing the formation of a new contractual relationship, it would not violate the Fifth Amendment. Congress may impose reasonable limitations upon freedom of contract in order to protect interstate commerce against industrial strife. The restriction imposed upon the employers' right to select employees for reinstatement following a strike is no different in kind or degree from the restriction upon the right of discharge which was upheld in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. Both restrictions are necessary to guarantee the right of self-organization. A discharge because of union activity and refusal to reinstate for the same reason are open warnings of identical import and intensity to all employees, and are equally strong incitements to industrial strife.

II. Even if the men involved were not "employees" within the meaning of the Act, the Board's order was authorized. Section 8 (3) makes it an unfair labor practice for an employer "by discrimination *in regard to hire* or tenure of employment * * * to encourage or discourage membership in any labor organization." This language plainly applies to an employer's conduct in *hiring* employees, and not merely to the discharge of persons already employed. Moreover, the coercion of "employees" forbidden by Section 8 (1) of the Act may be accomplished by discrimina-

tion directed, immediately, against prospective employees.

Nor is the Board's power "to take such affirmative action, including the reinstatement of employees with or without back pay, as will effectuate the policies of this Act" so circumscribed as to exclude the power to order the reinstatement of former employees in the circumstances at bar. The power to order the "reinstatement of employees" does not purport to be exclusive. The Board's power to require respondent to give positions, with back pay, to the five men here involved is subject to the single test of whether such action will effectuate the policies of the Act. Restoration of the five men to their former positions in this case was both appropriate and necessary to dissipate the coercive effect of the unlawful discrimination practiced against them.

III. The Board's finding that respondent had discriminated in reinstating its operators after the strike because of their union activity is supported by the great weight of the evidence. The Board found and the evidence shows that respondent placed on a list of eleven men required to apply for reinstatement after the strike five of its best operators, who were the leaders of the union, solely because of their union leadership and activity; that respondent had caused these men to believe that they were being permanently blacklisted because of their union activity and had therefore been responsible for their not applying immediately for

reinstatement, and that respondent had deliberately shifted to a "first come, first served" basis for reinstatement of the employees on the list of eleven only when it discovered that all of the men except the leaders of the union had applied for reinstatement and that they could thus be kept from returning to work.

IV. Respondent's contention that the rehearing granted by the Circuit Court of Appeals was a nullity, and that therefore the petition for certiorari should have been filed within 90 days of the first judgment below, is without merit. The circuit courts of appeals have power to grant rehearings in proceedings under the National Labor Relations Act, as they do in proceedings under the Federal Trade Commission Act. The petition for rehearing granted here was filed within the 30 days required by the rules of the court below, as the court held, and in any event the court had power during the term in which the original judgment was entered to waive this limitation in its rules.

ARGUMENT

I

THE BOARD'S ORDER IS EXPRESSLY AUTHORIZED BY THE ACT AND NOT PROHIBITED BY THE CONSTITUTION

Participating in an attempted nation-wide strike, respondent's point to point operators[4] in San Francisco ceased work at midnight of October 4,

[4] Respondent's operators include marine and land operators. The latter are called "point to point" operators.

1935. The strike failed. The unfair labor practices charged against respondent occurred in connection with the termination of the strike and the men's return to work. The Board found, and the evidence demonstrates (see pp. 54–67, *infra*), that respondent while reinstating the rest of the strikers excluded certain leaders of the union solely because of their union activity. The correctness of the Board's finding that such discrimination occurred was not questioned by the court below. See pp. 54–55, *infra*. The central issues presented are whether discrimination because of union activity in selecting for reinstatement employees who have voluntarily gone on strike is forbidden by the Act, and whether—if so—the Board is empowered to direct the reinstatement of the men thus discriminated against.

The text of the Act returns a peculiarly cogent and unambiguous answer to these questions. Section 8 (3) of the Act in terms makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." This provision alone forecloses all possible doubt as to the illegality of respondent's conduct under the statute (see pp. 49–52, *infra*). In Section 8 (1), the Act also forbids, in more general terms, interference with employees in the exercise of their right to form, join, or assist labor organizations and to engage in concerted activities for

the purpose of collective bargaining or other mutual aid and protection.

With respect to the affirmative relief ordered by the Board the Act is equally specific. Section 10 (c) empowers the Board upon a finding that an employer has engaged in an unfair labor practice, to require that he "take such affirmative action, *including reinstatement of employees* with or without back pay, as will effectuate the policies of this Act." If the men here in question were "employees," there is thus not even presented any question of construction as to what kind of affirmative action will effectuate the policies of the Act. Compare *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, decided February 28, 1938; see pp. 52–54, *infra*. By express inclusion the Act anticipates this issue.

As to whether the men whose reinstatement was ordered were employees the Act likewise permits no doubt. Section 2 (3) declares that "the term 'employee' shall include [*inter alia*] * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice * * *." This language plainly manifests the intention of the Congress that men on strike are to be treated as employees in the enforcement of the Act, regardless of whether the strike itself resulted from an unfair labor practice. But out of abundance of caution the Act proceeds further to define the phrase "labor dispute" as including, *inter alia*,

"*any* controversy concerning terms, tenure or conditions of employment * * * (Section 2 (9)).

The Board found (R. 21) that respondent's operators ceased work because of dissatisfaction with the state of negotiations which were being conducted by their representatives in an effort to secure an agreement concerning the terms of their employment. The findings recount in detail the circumstances of these negotiations (see pp. 29–31, *infra*). Since the object of the negotiations was an agreement "concerning terms, tenure or condition of employment," clearly the strike which was called when the negotiations failed to achieve their purpose was a "current labor dispute" within the statutory definition. Since the operators' work ceased as a consequence of this dispute, it is equally plain that they are "employees" within the meaning of the Act. Accordingly, the Board is expressly authorized by Section 10 (c) to require respondent to cease and desist from the unfair labor practice and "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

It thus appears that in every respect the Board's action in this case is authorized by the plain, unambiguous language of the statute. The legislative history confirms what otherwise is clear.[5] That the

[5] The report of the Committee on Labor of the House of Representatives (H. Rep. 1147, 74th Cong., 1st Sess.) de-

Board has the power exercised in the case at bar the circuit courts of appeals (including the Ninth Circuit, in a later case) have uniformly regarded as not open to question. *Black Diamond Steamship Corporation* v. *National Labor Relations Board* (C. C. A. 2d, February 14, 1938); *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 58 S. Ct. 55; *Mooresville Cotton Mills* v. *National Labor Relations Board,* 94 F. (2d) 61 (C. C. A. 4th);[6] *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. (2d) 509 (C. C. A. 5th), amended order affirmed and enforced without opinion, 93 F. (2d) 1010; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th, Judges Haney, Stephens, and Wilbur sitting). Only obfuscation of the statute, it is

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scribes the conduct prohibited by Section 8 (3) as follows (p. 19):

"The third unfair labor practice prohibits an employer, by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. * * * This interference may be present in a variety of situations in this connection, such as discrimination in discharge, lay-off, demotion or transfer, hire, forced resignation, or division of work; in *reinstatement or hire following* a technical change in corporate structure, *a strike*, lock-out, temporary lay-off, or a transfer of the plant." [Italics supplied.]

[6] On grounds not material here, the Board's order was not enforced as to four of the eight strikers ordered reinstated. With respect to these and other questions a petition for rehearing is now pending.

earnestly submitted, can create in this situation any problem as to its meaning.

The grounds advanced by the two judges of the court below for refusing to enforce the Board's order are various. They will be enumerated, and then discussed, *seriatim*.

(a) Judge Mathews held that the men who were refused reinstatement were not employees at the time the unfair labor practice occurred (R. 90–91). Respondent presses this contention (brief in opposition, pp. 18–22). The basis of the argument is the claim that the men had not ceased work as a consequence of, or in connection with, a "current labor dispute." Judge Mathews appears to have held that a strike called in the course of negotiations for a collective labor agreement, as a means of obtaining a favorable agreement, is not a current labor dispute within the meaning of the Act (R. 90). This holding was accepted by neither of the other judges. Respondent had not advanced this particular contention in the court below, but had made the broader argument that the Act does not forbid discrimination against men who have voluntarily gone on strike before the commission of any unfair labor practice by the employer. In this Court (brief in opposition, pp. 19–22), respondent has advanced the distinct and narrow contention that the men struck sympathetically, and that such a strike is not a "current labor dispute" under the Act.

(b) There is a suggestion in Judge Mathews' opinion that his holding was based upon a point of pleading rather than of substance—namely, that the complaint failed in terms to allege the existence of a "current labor dispute" (R. 90). This objection, which has been adopted by respondent, was raised neither before the Board nor in the argument before the court below. It likewise was not accepted by either Judge Wilbur or Judge Garrecht.

(c) Judge Wilbur, in his second opinion, held that for constitutional reasons the word "reinstatement" as used in Section 10 (c) should be construed—in the case of employees who have gone on strike prior to the commission of any unfair labor practice—to mean reinstatement only to the position of a striking employee and not reinstatement to a position of employment (R. 118–119). This construction was not accepted by either of the other two judges and had been rejected by Judge Wilbur himself in his first opinion (R. 86).

(d) Judge Wilbur and respondent contend that the Act would be unconstitutional if construed to authorize an order of reinstatement to a position of employment of men who have been the victims of an unfair labor practice, where the men had gone on strike before the unfair labor practice was committed (R. 118). This view was not accepted by either of the other two judges.

A. THE MEN WHO WERE THE VICTIMS OF RESPONDENT'S UNLAWFUL DISCRIMINATION WERE "EMPLOYEES" WITHIN THE MEANING OF THE ACT, SINCE THEY HAD CEASED WORK IN CONNECTION WITH "A CURRENT LABOR DISPUTE"

Section 2 (3) of the Act specifically defines employees to include persons whose work has ceased either (1) "as a consequence of, or in connection with, any current labor dispute" or (2) "because of any unfair labor practice." This language obviously brings within the protection of the Act employees on strike. Respondent's contention in the court below that strikers who had left their positions "by their voluntary act" (R. 116) ceased to be employees, protected by the Act against discrimination, was in the teeth of the statutory definition. As Judge Wilbur, with whom on this point Judge Garrecht agreed (R. 93), said in his first opinion (R. 86, 117):

> But to base our conclusion upon that theory in the case at bar would require us to ignore the declarations in the act itself that employees on a strike are to be considered still as employees within the meaning of the Act * * *. Consequently, the Board was acting well within the power Congress sought to vest in it * * *.

Respondent urged that the Congress cannot "create the relationship of employer and employee where no such relationship exists in fact" (R. 115), and that it must not be understood, there-

fore, as having attempted to do so.[7] There is no warrant for this suggestion that the definition adopted by the Congress is contrary to fact. The basis in fact of the legal relationship of employer and employee is the understanding and intention of the parties. The implication of fact in respondent's argument—that an employee in determining to strike determines to abandon his job, and so to abrogate the legal relationship—clearly is untrue. A strike has purpose and meaning only in so far as it contemplates a return to the job. The Act recognizes this fact and attaches to it the legal consequence that a workman while on strike retains, for the purposes of the Act, the legal status of an employee.

Nor can it be material whether the strike was preceded or caused by an unfair labor practice. The expressed alternatives in the statute are un-

[7] The Congress, of course, may define the terms it uses in a statute without restriction so long as the substantive result of the definition is not unconstitutional. Respondent's contention, so far as it is based upon the Constitution, is shown hereafter to be unsound (see pp. 41–49, *infra*). But the unambiguous terms of the definition in any event leave no room for construction, whether based upon avoidance of supposed constitutional doubts or otherwise. Respondent appears to have conceded that the inclusion of strikers within the term "employee" has at least the effect of compelling the employer to bargain collectively with the strikers (R. 115). But just as the inclusion of strikers in the definition cannot be wholly ignored, neither can its effect be thus arbitrarily limited. The Act imposes a duty to refrain from provocative discrimination as well as a duty to bargain collectively; and both duties must be enforced.

mistakable in their import. A person may remain an employee whether he has ceased work because of an unfair labor practice *or* in consequence of a current labor dispute. Denial of the applicability of the Act in the present case, therefore, must rest specifically upon denial of the existence of a current labor dispute. This Judge Mathews' opinion expressly recognized (R. 90–91), and this respondent—whatever may have been its position in the court below—appears now clearly to concede (brief in opposition, p. 18).

We find it difficult to understand how it can seriously be argued that there was no current labor dispute in the case at bar.[8] In Judge Mathews' own language (R. 90):

> The strike appears to have been called * * * because, as stated by the Board in

[8] The portion of his opinion in which Judge Mathews explains how he came to this conclusion reads as follows (R. 90–91):

"The trouble with this argument is that there is no allegation, no proof, and no finding that Loudermilk, Bash, Phelps, Rone, or Palmer ceased work 'as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice.' There is evidence that they participated in a strike, but no evidence that the strike was called, or that they participated therein, 'as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice.' The evidence shows that, at the time of, and for some months prior to, the calling of the strike, certain negotiations were pending between the American Radio Telegraphists' Association and respondent, but it does not show that there was any 'current labor dispute,' or that respondent had engaged or was then

> its findings of fact, the negotiators representing the Association "decided that a strike was advisable in view of the unsatisfactory state of the negotiations."

This language itself describes a labor dispute. It is difficult to imagine what such a dispute can be if it does not include a strike called because of the unsatisfactory state of negotiations between an employer and the representatives of his employees. What elements of a labor dispute are lacking in such a situation Judge Mathews conspicuously failed to point out. As to the elements which are requisite under the statute there can be no doubt. They are—as applied to the present case—(1) a "controversy", (2) "concerning terms, tenure or conditions of employment" (Section 2 (9)). The findings of the Board and the

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engaging in any 'unfair labor practice.' The strike appears to have been called, not 'as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice,' but because, as stated by the Board in its findings of fact, the negotiators representing the Association 'decided that a strike was advisable in view of the unsatisfactory state of the negotiations.' Since, on the facts, Loudermilk, Bash, Phelps, Rone, and Palmer do not come within the above quoted definition, it is unnecessary to consider respondent's contention that Sec. 2, subdivision (3), of the Act is unconstitutional and void.

"Since these men were not employees at the time they were alleged to have been interfered with, restrained, and coerced, such alleged interference, restraint, and coercion did not constitute an unfair labor practice, within the meaning of the Act. Therefore, in ordering respondent to cease and desist from such alleged interference, restraint, and coercion, the Board has exceeded its authority."

supporting evidence establish conclusively that both these elements were present in the case at bar.

(1) A strike would seem to be *per se* a controversy, regardless of the state of the negotiations out of which it grew. Respondent's suggestion that there was no "argument or expression of opposing views or claims" prior to the strike (brief in opposition, p. 20) passes cavalierly over the controlling fact that there was a strike. In consequence of, and in connection with, that strike the work of respondent's employees ceased.

But respondent's suggestion, apart from its premise, is without foundation. That "argument and the expression of opposing views and claims" had been taking place for months between respondent and the San Francisco local is outside the realm of question. An agreement concerning wages and working conditions, which had been originally prepared by the San Francisco local and ratified by all the other locals, had been presented to the Mackay officials in June 1935 and again in September 1935. In September, Salisbury, the Chairman of the San Francisco local, joined two of the national officers in New York, at their request, to press the union's demands (R. 20). Before Salisbury's departure, the San Francisco operators voted to back the demands, if necessary, to the extent of striking (R. 20, 170–171, 245–247). At a meeting with the leaders of the San Francisco local, Stone, respondent's operating vice-presi-

dent, who happened to be in San Francisco on September 13, asked for more time to consider the agreement (R. 21, 173, 412, 1098); there was testimony that at the meeting he threatened to close down the west coast circuits in the event of a strike (R. 175, 470; Bd. Ex. 2, at R. 1097–1098). The members of the committee felt that Stone's attitude at this meeting clearly presaged failure of the negotiations in New York (R. 1097–1100). On the same day the San Francisco local responded by giving the company until September 23 to execute the agreement, unless by that time the A. R. T. A. officials believed that the negotiations were proceeding satisfactorily (R. 21, 174–176, 247, 253, 256, 258, 484; Bd. Ex. 2, at R. 1098–1100). The Board found that in view of the prior authorization given these officials to call a strike, this was in substance fixing September 23 as the deadline after which a strike, if necessary, could be called (R. 21, 1100). The minutes of the meeting at which this ultimatum was voted reveal the gravity with which the members regarded it (Bd. Ex. 2, at R. 1096–1101). On October 4 Salisbury in New York called upon the local by telephone to comply with its prior strike vote inasmuch as Stone had refused to execute the contract and had made an unsatisfactory counter-offer (R. 21, 176; Bd. Ex. 3, at R. 1101). A meeting was held; a strike committee was unanimously elected (R. 21, 318–320; Bd. Ex. 3, at R. 1102); and at midnight all the operators on

duty, except the official in charge, went on strike (R. 21, 177, 422–423, 752–753).

If some element of acerbity be necessary to render negotiations between employer and employees a "controversy," assuredly it was present here. Words have lost their meaning if demands, which are continuously pressed for more than a month under repeated threats of a strike and as continuously refused with counter-threats of retaliation, can be described as noncontroversial.

(2) No less clearly was the controversy between respondent and the representatives of its employees one "concerning terms, tenure or conditions of employment." The Board specifically found (R. 20) that the agreement, the acceptance of which the union was demanding, was one "concerning wages and working conditions for the entire Mackay point to point system," including, of course, those of the San Francisco operators. Respondent's contention (brief in opposition, p. 22) that the "strike in San Francisco was a sympathetic strike in aid to the strikers in New York" is in the most exact sense frivolous. The argument is apparently based, if it has any basis, upon the assumption that the San Francisco operators could not be involved in a labor dispute because the negotiations were taking place in New York. That the San Francisco operators were personally concerned in the negotiations, and in the strike which followed, appears from hundreds of pages in the record. Nor in any case, it may be added, is there any

foundation for respondent's assumption that the strike, if it had been a sympathetic one, would not have constituted a labor dispute. Compare *Lauf* v. *E. G. Shinner & Co., Inc.*, decided February 28, 1938.

It is true that the findings of the Board did not state in so many words that the strike was a current labor dispute.[9] But the findings described in detail a conflict between the respondent and the San Francisco local in terms which show plainly that the conflict was a labor dispute.[10] As Judge Garrecht stated in his second dissenting opinion (R. 119):

> The evidence and findings are clear to the effect that a labor dispute culminating in a

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[9] Since respondent did not urge the objection that there was no labor dispute before the Board it cannot now complain that the Board's findings are inadequate in that respect. See Section 10 (e) of the Act, and the discussion at pages 36–37, *infra*.

[10] There can be no question as to the sufficiency of the Board's finding that the five men in question were "employees." The Board's detailed findings of fact show plainly what the status of the men was. The Board referred to them as employees. It specifically found that Phelps, one of the five, "was still an employee at the time of the strike" (R. 38) and referred to the other four as men who had held jobs with respondent at the time of the strike "and who because of union activity had temporarily severed their active work on those jobs but not their status as employees of respondent. See Section 2, subdivision (3) of the National Labor Relations Act." (R. 31.) In its concluding finding of fact the Board found that by refusing to reinstate the five men, "thereby discharging said employees * * * respondent did discriminate in regard to tenure of employment * * *" (R. 46).

> strike occurred as a climax to protracted and unsatisfactory negotiations.

The implications of Judge Mathews' opinion to the contrary are disturbing and far-reaching. If a strike in the employees' own self-interest does not *per se* constitute a labor dispute, then enforcement of the Act is consigned to the morass of classifying and appraising the rights and wrongs and the degrees of acerbity of pre-strike negotiations in order to determine which strikes are and which strikes are not disputatious. The result would approximate a reading out of Section 2 (3) of the Act the words "current labor dispute," having the effect of confining the category of "employees" on strike to employees whose work has ceased "because of any unfair labor practice." The penalty of a strike not prompted by an unfair labor practice would thus be complete loss of the Act's protection. Such a result is clearly inconsistent with the express direction of Section 13 of the Act:

> Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

See *National Labor Relations Board* v. *Remington Rand, Inc.* (C. C. A. 2d, February 14, 1938).

B. THE COMPLAINT ADEQUATELY ALLEGES THAT THE MEN IN QUESTION WERE EMPLOYEES WHO HAD CEASED WORK IN CONNECTION WITH A LABOR DISPUTE

Adopting an objection first advanced by Judge Mathews (R. 90–91), respondent contends (brief in opposition, pp. 23–24) that "the amended complaint

failed to allege a jurisdictional requirement, to-wit, that the men named in the complaint were employees as defined in the Act." This contention is to be distinguished sharply from that which has just been discussed. Whether upon the facts proved and found the men involved were employees within the meaning of the Act is a question of substantive law, depending upon the proper construction of the Act. Whether the complaint properly alleged that the men were employees, so as to permit the proof and findings actually made, is a question simply of pleading under the Act. There are two answers to respondent's objection: first, that it would be without merit, even if it were open; and, second, that it is no longer open under the Act, since it was not urged before the Board.

(1) The amended complaint alleges (R. 8) that respondent "during the period approximately October 7, 1935, to October 10, 1935, inclusive, * * * did refuse to reemploy" five named individuals, "operators employed by the respondent at the San Francisco office" because of their union activities, "and has at all times since said date refused to reemploy these said employees." It was further alleged that such conduct violated subdivisions (1) and (3) of Section 8 of the Act. These allegations expressly describe the men not reemployed as "employees." Only two possible objections can be made to the sufficiency of the allegations to support the proof and findings actually made—first, that the affirmative description of the operators as "em-

ployees" at the named dates was contradicted or qualified by the use of the verb "reemploy"; and, second, that the circumstances which rendered the men still "employees"—namely, cessation of work in connection with a strike, or labor dispute—were not expressly set forth.

The triviality of these objections is apparent. Technically it may be replied that the expression "reemploy * * * employees" at most introduces an ambiguity, open only to a motion to make more definite and certain; and that the circumstances which render the men "employees" under the Act go merely to support the main allegation that they are employees, and need not be set forth in the complaint. The important answer in point of substance, however, is that there is not the slightest ground for suggesting that respondent was in any way misled or harmed by any insufficiency in the amended complaint. The function of a complaint in a proceeding of this kind was described by Mr. Justice Brandeis, dissenting, in *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, at 430, as follows:

> The function of the complaint is solely to advise the respondent of the charges made, so that he may have due notice and full opportunity for a hearing thereon. It does not purport to set out the elements of a crime, like an indictment or information, nor the elements of a cause of action, like a declaration at law or a bill in equity. All that is requisite in a complaint before the

> Commission is that there be a plain statement of the thing claimed to be wrong, so that the respondent may be put upon his defense.

See also *Florida* v. *United States,* 282 U. S. 194, 209. The amended complaint here plainly satisfied this test. Knowledge as to why the men ceased work and of all the circumstances of the refusal to reemploy was obviously in respondent's possession.

(2) The second answer to respondent's objection is that respondent never urged before the Board that its complaint was defective for the reason now advanced. The Act provides in Section 10 (e) that—

> No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.[11]

That provision is plainly applicable here, as Judge Garrecht held (R. 93) and as Judge Mathews erroneously failed to hold. Not only in the charge and complaint but in the opening statement by counsel for the Board (R. 132–135) respondent had been fully apprised of the nature of the Board's case; and respondent's counsel had shown his

[11] It has not been suggested that the failure to urge the objection before the Board should be excused because of any extraordinary circumstances.

awareness (R. 129) of the necessity under the Act of taking any objections to the complaint in the administrative proceedings. Nevertheless, when the amended complaint was filed, no objection whatever was offered on respondent's behalf (R. 900–901). If at any time during the proceedings before the Board, the objection had been called to its attention, the Board would have had an opportunity to consider, and if necessary to correct, the alleged defect by a further amendment, as it is expressly empowered to do by Section 10 (b) of the Act. From the record it is perfectly clear that not until after Judge Mathews' opinion was handed down did it occur to respondent that there might be in the respect in question any technical inadequacy in the complaint as amended. A more appropriate occasion for enforcing the mandate of Section 10 (e) of the Act could scarcely exist.

C. JUDGE WILBUR'S CONSTRUCTION OF THE WORD "REINSTATEMENT" IS UTTERLY UNTENABLE

In his first opinion Judge Wilbur stated that the Board's decision was in all respects authorized by the Act, but held that the Act as here applied was unconstitutional (R. 86). After the decision of this Court in the *Jones & Laughlin* case, Judge Wilbur altered his position on the question of statutory construction. Apparently considering that the effect of the *Jones & Laughlin* decision should be strictly limited to the facts then before the Supreme Court, he reiterated in his second opinion

the argument that *Coppage* v. *Kansas,* 236 U. S. 1, and *Adair* v. *United States,* 208 U. S. 161, prevented the Act from applying to the circumstances presented in the case at bar (R. 118–119).

This "constitutional limitation" caused Judge Wilbur to give an extraordinarily strained meaning to the term "reinstatement" as used in Section 10 (c) of the Act.[12] He held that that term meant not reinstatement to a position of employment, which is obviously what it was intended to mean, but reinstatement to one's status at the time the unfair labor practice was committed (R. 118–119). In the case of employees discriminated against during a strike, his view was that the Board's power was limited to directing their reinstatement to the position of strikers, where they might remain indefinitely. Where, as here, the strike had terminated prior to issuance of the Board's order, the positions to which the employees would be entitled by Judge Wilbur's reasoning are peculiarly anomalous.

This is plainly not what the statute was intended to mean. Discrimination among strikers at the conclusion of a strike, by reason of their union activity, is clearly forbidden by Section 8, subdivision (3).[13] Power was vested in the Board to require

[12] Section 10 (c) authorizes the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

[13] See the report of the House Committee on Labor, quoted in note 5, *supra*, pp. 21–22.

reinstatement of employees discriminated against in violation of the Act in order that the coercive effects of such discrimination might be dissipated by restoration of the *status quo* existing prior to its commission. This requires restoration of the victims of the discrimination to the positions they would have occupied had they not been excluded from work because of their union activity. The discrimination occurred when the employees sought to return to work upon collapse of the strike; restoring them to positions as "strikers" is obviously futile to accomplish any of the purposes for which the power to direct reinstatement was granted the Board.[14]

In no just sense may restoration to such a position be described as reinstatement at all. In effect, Judge Wilbur's interpretation reads into the phrase "reinstatement of employees" in Section 10 (c) a limiting definition of "employee" which is inconsistent with the express definition of Section 2 (3), and which in terms was repudiated by Judge Wilbur himself (p. 25, *supra*). Employers would thus be given *carte blanche* to penalize union leaders

[14] The speciousness of Judge Wilbur's reasoning is shown by the fact that the status of the men at the time of the unfair labor practice was not that of active strikers but of men seeking reinstatement to their jobs. They were then entitled to reinstatement to wage-paying positions without discrimination. If time could be rolled back and these men restored to their status at that time, with discrimination eliminated, they would then have been reinstated along with the other employees.

in circumstances which are frequently recurring. The discouragement to collective bargaining and the incitement to industrial strife implicit in conduct so directly provocative the Act would be rendered ineffectual to avert.

In five cases other than the present, orders of the Board directing the reinstatement of strikers because of unfair labor practices committed during the strike have been passed upon by the circuit courts of appeals. In those cases the Second, Fourth, Fifth, and Ninth Circuits have given the statute its clear meaning and interpreted "reinstatement" to mean restoration to wage paying positions in the employer's plant. *Black Diamond Steamship Corp.* v. *National Labor Relations Board,* February 14, 1938 (C. C. A. 2d); *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 58 S. Ct. 55; *Mooresville Cotton Mills* v. *National Labor Relations Board,* 94 F. (2d) 61 (C. C. A. 4th); *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. (2d) 509 (C. C. A. 5th), amended order affirmed and enforced without opinion, 93 F. (2d) 1010. The Ninth Circuit, in a decision subsequent to that in the present case, agreed with this uniform line of authority, Judges Haney and Stephens concurring and Judge Wilbur dissenting. *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th). There are no contrary decisions.

D. THE ACT, CONSTRUED SO AS TO AUTHORIZE THE BOARD'S ORDER, IS CONSTITUTIONAL

Judge Wilbur deemed the forced interpretation just discussed necessary to save the constitutionality of the Act. He was of the opinion that the Board's order compelled respondent to enter into new contracts of employment with the five men ordered reinstated and that the Fifth Amendment precluded such a requirement. While conceding that employees on strike were intended by Congress to be included within the scope of the Board's reinstatement power (R. 118), Judge Wilbur nevertheless held that constitutional limitations necessitated restriction of that power to cases in which its exercise would not require initiation of a new employment relation. On this analysis, he held, reinstatement to positions of employment may be directed only when the employee's cessation of work is not voluntary but is caused by the wrongful act of the other party to the contract—that is, where the employee is discharged in violation of the Act (*ibid.*). Workers who go on strike voluntarily abrogate the employment relation, he declared; and the condition prerequisite to validity of an order directing their reinstatement cannot be met (R. 118–119).[15]

[15] It is thus apparent that the constitutional issue here presented is identical with that involved where the Board directs the reinstatement of strikers *generally* because the employer's unfair labor practices have caused or prolonged the strike, as in the *Black Diamond*, *Remington Rand*, *Jeffery-DeWitt* and *Carlisle* cases, *supra*. In the present case and the *Bell Oil* and *Mooresville* cases, *supra*, the

A conclusive answer to Judge Wilbur's reasoning is that there is no question here of requiring respondent to enter into a new employment relation. The Act clearly provides that during a labor dispute the strikers retain in full the status of employees (Section 2 (3)). In so providing, Congress made no innovation in the law applicable to industrial disputes. It has frequently been held, in cases not involving statutory definitions of "employees" to include men on strike, that the employment relation subsists during a test of economic power between the employer and workers who have left his plant with the intent of returning when the issues in dispute have been settled. *Michaelson* v. *United States,* 291 Fed. 940, 942 (C. C. A. 7th), reversed on other grounds, 266 U. S. 42; *Iron Moulders' Union* v. *Allis-Chalmers Co.,* 166 Fed. 45, 52 (C. C. A. 7th); *Dail-Overland Co.* v. *Willys-Overland Co.,* 263 Fed. 171, 187, aff'd, 274 Fed. 56, 65 (C. C. A. 6th); *Fryns* v. *Fair Lawn Fur Dressing Co.,* 114 N. J. Eq. 462, 168 Atl. 862, 865; *State* v. *Personett,* 114 Kan. 680, 220 Pac. 520, 524; *Uden* v.

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reinstatement order included only the particular strikers against whom discrimination forbidden by Section 8 (3) of the Act was directly exercised. The issue treated by Judge Wilbur would also arise in a case where an applicant for employment was refused it because of union membership and the Board corrected this palpable violation of Section 8 (3) by directing that the victim be given a job. If correct, Judge Wilbur's analysis therefore would preclude any appropriate affirmative relief against the yellow dog contract, a prolific cause of industrial unrest which is clearly interdicted by the Act.

Schaeffer, 110 Wash. 391, 188 Pac. 395; *Greenfield* v. *Central Labor Council,* 104 Ore. 236, 192 Pac. 783, 787. These common law authorities were reviewed at length by the Circuit Court of Appeals for the Fourth Circuit in the *Jeffery-DeWitt* case, *supra,* and the court concluded that—

> Irrespective of the statute, therefore, the strike did not of itself result in a complete severance of the relationship which had been established between the company and its employees. *They were employees on strike because of the labor dispute which existed* * * * (91 F. (2d) at 138). [Italics supplied.]

The *Jeffery-DeWitt* case was followed by Judges Haney and Stephens of the Ninth Circuit in *National Labor Relations Board* v. *Carlisle Lumber Co., supra.*

It cannot be said, therefore, that a requirement that strikers be reinstated directs the employer to enter into a new employment relation, or that this would be the effect of such requirement were it not for the definition of "employee" erected by the Act. Whether viewed under the Act or under the pre-existing common law, the reinstatement order merely requires that a relation which has never been completely severed be actively resumed. The premise upon which Judge Wilbur's ruling of unconstitutionality is based is thus false, and his conclusions are left unsupported.

Were the premise true, however, the conclusions still would be untenable. Assuming that the statute

provides for continuance, during a strike, of a relation which would not continue in the absence of statute, and therefore that the Act, when applied to authorize the reinstatement of strikers, directs the formation of what would be a new relationship were it not for the statutory provisions, it does not follow that such application violates the Fifth Amendment. This Court has held that the Act is a valid exercise of the commerce power. In the exercise of that power Congress may impose reasonable regulation upon contractual relationships and restrict freedom to enter or refrain from entering them so long as such regulation and restriction are conducive to the protection of commerce against the industrial strife which threatens it. This Court, in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, specifically sustained on that basis a limited restriction upon the employer's right to terminate the employment relation, upholding a prohibition against discharge for union activity. That the Board's order directing the reinstatement of discharged employees interfered with the freedom of contract which the employer would have enjoyed apart from the statute did not preclude Congress from imposing this proper sanction "for the enforcement of its valid regulation" (301 U. S. at p. 48).[16]

[16] Judge Garrecht, dissenting, in the Court below, gave expression to elementary principles of constitutional law when he stated that "the relationship of employer and employee, while initiated by contract, is a status the incidents

If the employer is permitted to discriminate, either in selection or discharge, against persons who are active members of labor organizations, employees are not free to choose their own representatives. Many employees would be afraid to

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of which may be altered by the legislature under its police power. In the field of interstate commerce it is the Congress which exercises this police power" (R. 122). To the examples given by Judge Garrecht of the valid exercise of Congressional power to regulate and modify the employment status may be added the following restrictions against which the due process clauses of the Fifth and Fourteenth Amendments have been raised in vain: Prescribing hours of labor in particular occupations, *Holden* v. *Hardy*, 169 U. S. 366; *B. & O. R. R. Co.* v. *I. C. C.*, 221 U. S. 612; *Bunting* v. *Oregon*, 243 U. S. 426; prohibiting child labor, *Sturges & Burn Mfg. Co.* v. *Beauchamp*, 231 U. S. 320; forbidding night work by women, *Radice* v. *New York*, 264 U. S. 292; reducing hours of labor for women, *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671; *Miller* v. *Wilson*, 236 U. S. 373; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348; and railroad employees, *St. Louis I. M. & St. P. Ry. Co.* v. *Paul*, 173 U. S. 404; *Erie R. R.* v. *Williams*, 233 U. S. 685; regulating the redemption of store orders issued for wages, *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224; regulating the assignment of wages, *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; requiring payment for coal mined on a fixed basis other than that usually practiced, *McLean* v. *Arkansas*, 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple*, 236 U. S. 338; establishing a system of compulsory workmen's compensation, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Crowell* v. *Benson*, 285 U. S. 22; *Rowlette* v. *Rothstein Dental Laboratories*, 63 F. (2d) 150, cert. den., 289 U. S. 736; restricting or eliminating common law defenses against recovery for injury in course of employment, *Second Employers' Liability Cases*, 223 U. S. 1; prohibiting contracts limiting liability for personal injury, when made in advance

participate in union activities if in the event of a strike the employer could discriminate against them for that reason alone. An employer seeking to break up a union could easily provoke a strike, by methods perhaps not in themselves illegal—such as the establishment of wages or working conditions clearly unacceptable to the employees—and then refuse to reinstate the leaders of the union. The mere possibility of such conduct on the part of the employer would prevent many employees from freely joining labor organizations to which the employer might be opposed.

The Board's experience demonstrates that discrimination of the kind here involved is not infrequent.[17] Such conduct would undoubtedly become

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of injury received, *Chicago, B. & Q Railroad Co.* v. *McGuire*, 219 U. S. 549; requiring service letters upon termination of employment, *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530; *Chicago, R. I. & Pac. Ry. Co.* v. *Perry*, 259 U. S. 548; providing a minimum wage for women, *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.

[17] See *First and Second Annual Reports of the National Labor Relations Board*, at pp. 81–83, and 76–78, respectively, and the following cases: *In the Matter of United Aircraft Manufacturing Co.*, 1 N. L. R. B. 236; *In the Matter of The Timken Silent Automatic Co.*, 1 N. L. R. B. 335; *In the Matter of Canvas Glove Manufacturing Works, Inc.*, 1 N. L. R. B. 519; *In the Matter of Sunshine Hosiery Mills*, 1 N. L. R. B. 664; *In the Matter of Segall-Maigen Co.*, 1 N. L. R. B. 749; *In the Matter of Columbia Radiator Co.*, 1 N. L. R. B. 847; *In the Matter of Alabama Mills, Inc.*, 2 N. L. R. B. 20; *In the Matter of Mackay Radio & Telegraph Co.*, 2 N. L. R. B. 500; *In the Matter of Clark & Reid Co., Inc., and Curtis & Croston, Inc.*, 2 N. L. R. B. 516; *In the Matter of Remington Rand, Inc.*, 2 N. L. R. B. 626; *In the Matter of Lion*

much more frequent if it were held not to violate the Act. In the light of these facts the present National Labor Relations Board,[18] as well as its predecessors established under the National Industrial Recovery Act [19] and Public Resolution No. 44, 74th Cong., 1st Sess.,[20] have uniformly ruled that discrimination in reinstatement of striking employees must be remedied by restoring the victims to their jobs.

Shoe Co., 2 N. L. R. B. 819; *In the Matter of Elbe File & Binder Co.*, 2 N. L. R. B. 906; *In the Matter of Black Diamond Steamship Corp.*, 3 N. L. R. B. No. 8; *In the Matter of Maryland Distillery Co., Inc.*, 3 N. L. R. B. No. 16; *In the Matter of Kentucky Firebrick Co.*, 3 N. L. R. B. No. 46; *In the Matter of Highway Trailer Co.*, 3 N. L. R. B. No. 65; *In the Matter of Wald Transfer & Storage Co., Inc.*, 3 N. L. R. B. No. 72; *In the Matter of Lee Clay Products Co.*, 3 N. L. R. B. No. 83; *In the Matter of Phillips Packing Co., Inc.*, 5 N. L. R. B. No. 54; *In the Matter of American Manufacturing Co.*, 5 N. L. R. B. No. 67.

[18] *Ibid.*

[19] See, *e. g.*, *In the Matter of General Baking Co.* and *Bakery Wagon Drivers, Chauffeurs and Helpers Union, Local No. 463*, decided Jan. 4, 1934, Decisions of the National Labor Board, Part I, p. 32; *In the Matter of Finck Cigar Co.* and *Cigar Makers' International Union of America*, decided May 12, 1934, *Ibid.*, Part II, p. 26; *In the Matter of Eagle Rubber Co.* and *United Rubber Workers Federal Labor Union No. 18683*, decided May 16, 1934, *Ibid.*, Part II, p. 31.

[20] *In the Matter of K. O. Lee & Son Co.* and *Hans Christianson, Milton Frantz, James P. Davies*, decided Sept. 8, 1934, Decisions of the (old) National Labor Relations Board, Vol. I, p. 59; *In the Matter of International Furniture Co.* and *Upholsterers, Carpet and Linoleum Mechanics International Union*, decided Sept. 11, 1934, *Ibid.*, Vol. I, p. 63; *In the Matter of North Carolina Granite Corp.* and *Granite Cutters International Ass'n, Mt. Airy Branch*, decided Sept. 24, 1934, *Ibid.*, Vol. I, p. 89.

The restraint imposed in the instant case upon the employer's *selection* of employees for reinstatement following a strike is as limited, as necessary, and wholly as reasonable as the restriction on the right of *discharge* sustained in the *Jones & Laughlin* case. The former regulation does not impair the employer's freedom of contract or deprive him of property to a greater degree or in any different manner than the latter. Both are equally essential to secure the rights of self-organization and collective bargaining guaranteed in the Act and thus to protect the free flow of commerce. A discharge because of union activity and a refusal to reinstate for the same reason are open warnings of identical import and intensity to all the employees and are equally strong incitements to industrial strife. The opinion of this Court in the *Jones & Laughlin* case indicates that no material difference between the two limitations is discernible and that both are valid. The Court there stated (301 U. S. at pp. 45–46):

> The Act does not interfere with the normal exercise of the *right of the employer to select its own employees or to discharge them.* * * * It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of *the right of selection and of discharge.* [Italics supplied.]

The principles of the *Jones & Laughlin* decision, it is submitted, fully support the constitutionality of an order directing the reinstatement of strikers. This has been the ruling of all the circuit courts of appeals which have passed upon the question. If Judge Wilbur's views are correct, the statute was unconstitutionally applied in the *Black Diamond, Jeffery-DeWitt, Mooresville, Bell Oil,* and *Carlisle* cases, *supra,* in all of which the courts upheld the reinstatement of strikers who were not found to have ceased work as a result of an unfair labor practice. Those cases, it is submitted, have applied the Act in accordance with its clear terms and the applicable principles of the *Jones & Laughlin* case. Judge Wilbur's reasoning, repudiated *sub silentio* by other judges in the Ninth Circuit in the *Carlisle* case, is erroneous and has resulted in denial of enforcement to a valid and proper order of the Board.

II

RESPONDENT'S DISCRIMINATION WAS UNLAWFUL AND THE BOARD'S ORDER WAS VALID REGARDLESS OF WHETHER THE MEN DISCRIMINATED AGAINST WERE EMPLOYEES WITHIN THE MEANING OF THE ACT

It has heretofore been assumed that the validity of the Board's order depends upon whether the five men ordered reinstated were "employees" within the meaning of the Act. The opinions in the court below apparently proceeded upon this assumption. The Board found that the men were "employees"

and this conclusion has been demonstrated to be correct. It should be pointed out, however, that independently of this finding the Board's order is fully authorized by the Act.

The Board's order is divided into two parts, (1) the negative provisions which require respondent to cease and desist from engaging in unfair labor practices, and (2) the affirmative provisions which require respondent to offer reinstatement with back pay to five named individuals. We will consider these two portions of the order separately, and show that as to neither must the Board's order be predicated on a finding that the men involved were employees.

(1) The cease and desist provisions of the order require for their support only a finding of violation of one of the subdivisions of Section 8 of the Act. Section 8 (3) of the Act makes it an unfair labor practice for an employer "by discrimination *in regard to hire* or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This provision manifestly is not limited in application to an employer's conduct toward persons with whom he has a preexisting relation of employment. The language quoted specifically refers to "discrimination in regard to hire," and was obviously intended to apply to an employer's conduct in refusing employment to union members on the sole ground of such membership—not merely to the dis-

charge of persons already employed. Were this not so, there would be nothing in the statute to meet the evil of the yellow-dog contract to which, it is public knowledge, the intention of the Congress was directed.

Nor has the status as employees of the persons who are the subject of discrimination any necessary relevance to the issue of violation of Section 8 (1) of the Act. That section makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." But coercion of employees manifestly may be accomplished by discrimination against those who are seeking employment. Each instance of discrimination because of union activity, be the victim an employee or not, is an open warning to those already employed, and constitutes a coercive interference with the rights of self-organization guaranteed to those employees in Section 7 and protected by Section 8 (1). Since discrimination against an applicant for employment because of his union membership would affect all the employees, it would plainly support a cease and desist order based upon Section 8 (1) of the Act.

Judge Mathews' holding that the men to whom the Board ordered respondent to give employment were not "employees" within the meaning of the Act (R. 90–91) thus affords no warrant—even if it were otherwise correct—for his refusal to en-

force the negative provisions of the Board's order. Judge Wilbur's refusal to enforce those provisions is even more patently erroneous. His reasoning—centering upon the meaning of the word "reinstatement" (R. 118–119)—does not even purport to be relevant to the authority of the Board to order respondent to desist from its violation of Sections 8 (3) and 8 (1). The Board's power to order reinstatement is a power to grant specific and affirmative relief, entirely separate from its preventive power to issue cease and desist orders.

(2) The power of the Board to order reemployment of former employees presents a distinct question. Section 10 (c) authorizes the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The particular authority expressly vested in the Board to order the "reinstatement of employees" is not part of an enumeration implying exclusion of any other similar authorization, but rather the contrary. The report of the Committee on Labor of the House of Representatives states of the power vested in the Board by Section 10 (c) (H. Rep. 1147, 74th Cong., 1st Sess., at p. 24):

> The orders will of course be adapted to the needs of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargain-

> ing, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices. The most frequent form of affirmative action required in cases of this type is specifically provided for, i. e., the reinstatement of employees with or without back pay, as the circumstances dictate.

It has been demonstrated that refusal to reemploy former employees because of their union activities is an unfair labor practice (see pp. 50–52, *supra*). The particular grant of power to reinstate employees does not preclude authority to require reemployment of former employees any more than it eliminates the power to order other forms of affirmative action, such as those enumerated in the House Report, which are found by the Board in administering the Act to be necessary to effectuate its policies.

It follows that the Board's power to require respondent to give positions, with back pay, to the five men here involved is subject to the single test of whether such action will effectuate the policies of the Act. The determination of the Board that such action is an appropriate means of carrying out those policies will not be disturbed if supported by the evidence adduced. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.; National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, both decided February 28, 1938. On the facts here presented, restoration of

the five men to their former positions was both appropriate and necessary to dissipate the coercive and interfering effects of the discrimination practiced against them.[21] For this reason, it is submitted, the Board's order was clearly authorized by the Act, whether or not the five men were found to satisfy the statutory definition of "employee." Enough has already been said (see pp. 43–49, *supra*) to show that in neither event does a construction of the Act authorizing such an order render it unconstitutional.

III

THE BOARD'S FINDING THAT RESPONDENT REFUSED TO REINSTATE CERTAIN OF ITS EMPLOYEES BECAUSE OF THEIR UNION ACTIVITY IS SUPPORTED BY EVIDENCE

In the court below respondent contended that the Board's finding that five employees had been refused reinstatement because of their union activity was not adequately supported by evidence. Judge Garrecht, in his dissenting opinion, declared that

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[21] Upon an issue of this character, the technical status of the five men as "employees" under Section 2 (3) is, of course, not controlling. The long and satisfactory records of the five while in respondent's employ, absent in the case of a new applicant for employment, clearly point the equities in their favor by removing all doubt that they would now be at work were it not for their union activities. Questions of fitness, personality, etc., of a new applicant which might render doubtful the question whether, in directing his employment, the Board was merely requiring an act which would have been done in any event were it not for the applicant's union activity, are clearly not involved here.

there was evidence to support the finding; but the majority of the court did not pass upon the question. We think that the contention is so insubstantial that in the event that respondent renews it this Court will have no difficulty in disposing of it here, as was done in similar circumstances in the Labor Board cases at the last term.

Section 10 (e) of the National Labor Relations Act declares, and this Court has held, that the Board's findings of fact are conclusive if supported by evidence. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 147; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* decided February 28, 1938. And in the *Greyhound* cases this Court pointed out that it is for the Board and not for the courts to draw inferences from the facts before it. See also *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Company,* 291 U. S. 67, 73.

In the light of these governing principles we turn to an examination of the evidence before the Board bearing upon the reasons for respondent's refusal to reinstate the five men in question. The circumstances leading up to the strike on October 4, 1935, have already been related. See pp. 29–31, *supra.* The strike was not effective outside of San Francisco, and by Monday, October 7, after respondent had brought operators from other stations to San Francisco, the strikers in that city were wavering

(R. 21–22, 182–183, 983, 1025–1026, 1028–1031, 1055–1056). That night two employees on their own responsibility communicated with Jorgensen, respondent's traffic manager in San Francisco,[22] and agreed with him to call immediately a meeting of the men in Jorgensen's presence to decide whether the men should return to work (R. 22, 597–598, 601, 843). It was understood that this Monday meeting was to be of the men as employees, not as A. R. T. A. members (R. 23, 632–633, 635–636). Jorgensen furnished the two volunteers with a list of names of the San Francisco operators for the purpose of calling the meeting, but checked the names of eleven men whom he said would have to make applications for reinstatement to be passed on by Stone, respondent's vice-president, in New York (R. 22–23, 600–601, 628–630, 774–775). The rest of the men were to be permitted to return without this procedure. Jorgensen knew of and acquiesced in the volunteers' deliberate failure to notify the eleven men on the list when informing the other operators of the meeting by telephone (R. 23, 630–633, 702–703, 762, 773, 775).

At the meeting, which began at 4:30 Tuesday morning, Jorgensen repeated respondent's position that all the operators could return to work immediately with the exception of the eleven; and the

[22] Jorgensen was in immediate charge of the San Francisco operators, with full authority to hire and fire; he was assisted by three or four supervisors (R. 19, 740, 749, 751, 873, 1006–1007).

list of those men, which included Loudermilk, Bash, Rone, and Palmer, four of the five men ordered reinstated by the Board, was read twice (R. 23, 322, 426, 671–672, 813–814, 866–867, 908). In the discussion which ensued it was pointed out that a return to work would mean the jobs of the eleven men, but the men voted to return to work, and did so immediately (R. 23–24, 324–326, 425–426, 795, 910–911).

By late Tuesday afternoon all of the operators, including five of the men on the list (those excepted including Loudermilk, Bash, Rone, Palmer, and Salisbury, the Chairman of the local, who was in New York at the time) had returned to work (R. 24). Loudermilk and Palmer, after repeated futile attempts to see Rodman, respondent's general superintendent, finally succeeded at six o'clock Tuesday afternoon and were told to fill out applications to be passed on by Stone in New York (R. 24, 328–330, 427–428, 1007–1009, 1046–1047, 1068–1069). Bash and Rone received the same instructions from Jorgensen on Wednesday (R. 24, 197–199, 474–475, 829). Rodman sent the four applications to Stone with the recommendation that since no vacancies existed they be placed on file; this recommendation was approved (R. 24, Bd. Ex. 4, at R. 1102–1103; 6, at R. 1119–1120; Resp. Ex. 3, at R. 1131; 11, at R. 1138–1139). None of these men had been reinstated at the time of the hearing.

The four men thus refused reinstatement were, together with Salisbury (who was discharged when

his leave of absence expired), the recognized leaders of Local No. 3 and the most active in its affairs (R. 25–27, 156–157, 159–160, 166, 172–173, 186–187, 196, 292–310, 404, 405–406, 410–411, 422, 461–462, 468–469, 470–471). Their activities were well known to respondent (R. 28, 749, 847–848, 967–968, 987–988, 1063). Theirs were four of the first six names on the list of eleven; the other two, York, a supervisor, and Salisbury, were those of men who were also active in union affairs (R. 27–28, 166, 170–172, 245–246, 871–872). The rest of the list was composed of inferior operators, whereas Palmer, Rone, Loudermilk, Bash, and Salisbury were "Class A" operators of high seniority and earning the top salary of $180 per month; they were among respondent's best (R. 27–28, 136, 291–292, 404, 460–461, 743, 758–759, 780, 837–838, 949, 991). Jorgensen could not remember ever having laid off an operator of their classification (R. 34, 835–836).

Respondent explains the presence of the first four on the list on the ground that they were guilty of what can only be termed petty infractions of rules at various times prior to the strike—infractions for which they had never been disciplined (R. 33, 756–759, 767–769, 837–838). The reason given why Salisbury, who was subsequently discharged, appeared on the list, namely, that he had violated the terms of his leave of absence, is obviously sham (R. 34, 770). Respondent frankly admits that York, a supervisor, was included because his loyalty was doubted on the basis of remarks made by him dur-

ing the strike; it was also felt that a supervisor should not strike (R. 27–28, 33, 763–764). York was demoted from his supervisory position after the strike (R. 27–28, 872–873). The remaining five men were not active in the union and were on the list because of their inefficiency (R. 33–34, 764–765, 991). The divisible nature of the list was recognized at the meeting where it was presented (R. 34, 326–327).

The Board found that the reason respondent placed Loudermilk, Rone, Bash, and Palmer on the list and subsequently failed to reinstate them was their activity in Local No. 3. It is respondent's position that, regardless of why they appeared on the list, they were not reinstated because at the time they applied there were no jobs available (R. 31, 794, 1016, 1059–1060). Respondent contends that on Monday afternoon it was thought that as many as eleven of the strikebreakers might elect to remain in San Francisco, decreasing by that number the positions available for the striking operators (R. 28–29, 747–748, 776). Jorgensen, after discussing the "overall general satisfaction" of the various operators with Rodman, prepared a list of the eleven least "desirable" men (R. 28–29, 750–752, 762–763, 1051–1053). After reinstatement of the other operators, men from this list were to be carefully selected for positions in the event some of the strikebreakers did not stay (R. 29, 772–773, 812–814, 825–828). However, all of those on the list except Loudermilk, Bash,

Rone, Palmer, and Salisbury returned to work by 4 o'clock Tuesday afternoon (R. 30, 955–957). By that time respondent's officials at San Francisco knew that only five or six of the strikebreakers wished to remain (R. 30, 957). Rodman telephoned Stone in New York, reported that a full staff was working, named the four operators who were still out, and recommended that those on the list of eleven who were at work be retained since they were good operators and there was no "serious objections to them"; the reason why they had been put on the list—inferior ability—was apparently no longer persuasive (R. 30, 957–958, 1012–1013). Stone approved this recommendation, and the books were closed (*Ibid.*). That the four men not returned to work were also the leaders of the union is, in respondent's view, mere coincidence (R. 32).

The Board pointed out that respondent altered the standard governing selection among the men on that list at a time when a shift would serve to eliminate the union leaders (R. 32). Prior to the time when only these four men remained outside, it had apparently been respondent's intention and the men had been informed that each man on the list was to be carefully weighed against the others in determining who was to be reinstated; no mention had been made that priority of application might be significant (R. 32, 29, 772–773, 812–814, 825–828). The ultimate decision was to be made in New York by Mr. Stone, a fact which indicated

that several hours difference in the time of application would not be material. When it was realized, however, that the four union leaders were the last to apply, the rule of priority in application was suddenly adopted (R. 32, 828). The Board held that this was done for the purpose of discriminating against the four men and thus discouraging membership in the union.

The placing of the names of these four men on the list was the first step leading to the company's refusal to reinstate them. The Board found that their names had been placed on the list solely because of their union activity. If it had not been for their inclusion on the list, these four employees would not have been the last to apply for reinstatement (R. 35–36). Respondent contended that Jorgensen had told the men at the meeting that it was his intention that all eleven men whose names had been checked off immediately return to work, but only on a temporary basis until after their applications for reinstatement had been approved. If this was his intention, it was intelligible to no one save himself; those at the meeting understood that the operators named would not be permitted to work until their applications had been approved by Stone in New York (R. 35–36, 322, 436, 564–565, 761–762, 775–776, 813–814, 861–864, 865–866, 867, 909). Thus respondent's attitude indicated not only that the eleven would not be taken back at all, but also that there was no need of haste in ap-

plying. As the Board found, this lulled the four men into yielding to the natural disinclination of strike leaders to return before all their followers had surrendered (R. 35–36). Application of the "first come, first served" rule in these circumstances, the Board found, was clearly calculated to discriminate against the union leaders (R. 36).

The finding that the cause of such discrimination was the union activity of the men does not rest solely upon the natural inferences arising from their positions in the local, their long terms of service and proven excellence as operators, and the unconvincing reasons advanced by respondent for putting them on the list. When Loudermilk and Palmer applied to Rodman for reinstatement, the former inquired whether the chances of approval by Stone were good (R. 26, 1008–1009). Rodman testified that he had answered in the negative and had pointed out that Loudermilk had a "national reputation," being known as "a very active—or something of an agitator" (R. 26–27, 1009).[23] Re-

[23] Rodman added, "I may have put it a little stronger than that. I remember I told Mr. Loudermilk that in my opinion many of the company's troubles had been stirred up by him" (R. 26–27, 1009). Loudermilk's memory was more distinct. He testified that Rodman said: "Well, now, Loudermilk, why should he (Stone)—after all, you know you are the real leader—the ringleader of this organization. Why, you are the No. 1 public enemy as far as we are concerned; you are the head of the list! Why, you have a national reputation for causing us trouble. * * * This Union proposition is controlled by a bunch of agitators and reds; and you know it just simply has to be stopped" (R. 26–

spondent's treatment of Salisbury, chairman of the local's point to point division, is also illuminating, although no relief for his discharge was sought in the present case. Shortly after the strike, during which he was on leave of absence, Salisbury applied for permission to resume work (R. 27, 998–1000). He was required to fill out a questionnaire; the questions concerned his "loyalty" to respondent and his views on working conditions (R. 27, Bd. Ex. 21, at R. 1117; R. 998, 1064). In his answers, which were forwarded to Stone, Salisbury defended his union activity, stated that he could be loyal unless "loyalty" meant not belonging to a union, and criticized respondent's discrimination against members of A. R. T. A. (R. 27, Bd. Ex. 21 at R. 1117; R. 1066). When Salisbury's leave of absence expired he was discharged (R. 27, 1000, 1067–1068).

Phelps, the fifth employee ordered reinstated by the Board, was not an operator at the central San Francisco office, but was manager of the branch office located in the Stock Exchange (R. 36, 507). He was a member of Local No. 3, but, unlike the other four, was not outstandingly active in its affairs (R. 37, 507, 536–537). He joined in the strike on October 5 and learned of its collapse at 7 a. m. on Tuesday, October 8 (R. 37, 508, 515, 532). He

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27, 330). Rodman, in his testimony, denied that he had called Loudermilk "Public enemy No. 1" or "ringleader" but admitted charging that A. R. T. A. had communist affiliations (R. 1010–1011). Palmer corroborated Loudermilk's version of the incident (R. 428).

failed in an immediate attempt to reach Dewey, his immediate superior, by telephone and thereupon proceeded to the Stock Exchange office where he was denied admission (R. 37, 515–516, 532, 1013). He tried to see both Dewey and Rodman at 8 a. m., but was informed they were out (R. 37, 516). He waited and, at 9 a. m., saw Dodd, secretary of respondent and Rodman's assistant (R. 37, 516). Dodd promised to talk to Rodman, and Phelps waited in the outer office until 1 p. m., when Dodd stated that he had talked to Rodman, but had forgotten to mention Phelps and suggested that the latter return at 3 p. m. (R. 27, 517). Phelps entered Dodd's office at three; Rodman, who was inside, exclaimed angrily: "Get out of here! Don't keep coming around here! I don't want to talk to you" (R. 37, 517, 521, Bd. Ex. 7 at R. 1121–1122). The same day Dewey told Phelps to file an application, which he did (R. 37, 518–519). Rodman ignored Phelps' efforts to see him the next day, and Dewey told Phelps that his job had been given to one of the strikebreakers and that "You are out of the Stock Exchange for good" (R. 37, 520).

Rodman testified at the hearing that Phelps was not reinstated because he did not apply until 3:30 p. m. on Tuesday when he first saw Dewey, whereas his position had been filled at noon (R. 38, 1016–1017).[24] But he had applied to Dodd, a responsible

[24] It was also suggested that inefficiency and Dewey's alleged suspicion of Phelps as a "leak" to Western Union caused his discharge; in support of this respondent showed that about three months prior to the strike the floor manager

official, at 9 a. m., and had been attempting to see Dewey or Rodman all morning. Dewey called these facts to Rodman's attention, and described them as in effect advancing the time of application "to early in the morning of October 8th" (Bd. Ex. 8, at R. 1122–1123). To balance this unsatisfactory explanation, and revealing the true cause of Phelps' discharge, is Rodman's testimony that "We did not approve of a commercial man, in charge of an office, becoming a member of an organization such as A. R. T. A." (R. 39, 1050–1051). This admission establishes beyond all dispute what is in any event readily inferable from respondent's unexplained refusal to reinstate Phelps—that the reason therefor is to be found in Rodman's disapproval of Phelps' membership in Local No. 3.

The Board found that Rone, Bash, Palmer, Loudermilk, and Salisbury—all concededly among

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of the Stock Exchange requested Dewey to dismiss Phelps, which request was promptly rescinded by the president of the Exchange (R. 38, 1014–1015, 1040). On October 8 the president wrote a letter to Dewey on behalf of Phelps, describing him as "keen, alert, courteous, and active in his duties" and "a decided asset to your Company" (Bd. Ex. 9, at R. 1123). Another official of the Exchange supported this opinion, praising Phelps' ability and loyalty to respondent (Bd. Ex. 10 at R. 1123–1124). Dewey himself noted in a memorandum to Rodman dated October 16 that Phelps' "services as a contact man and as an operator have always been of a high order" (Bd. Ex. 8, at R. 1122–1123). In view of these circumstances and the fact that no action was taken against Phelps prior to the strike, the Board was fully justified in rejecting these purported explanations of his discharge (See R. 38).

respondent's best operators and also the leaders of the union—"were placed on the list because of their union leadership and activity" (R. 35). This finding, which is fully supported by evidence, would without more show that the respondent had coerced and discriminated against employees because of their union activity. But the Board did not rest its decision on this ground alone, since it also found (1) that respondent had caused these men to believe that they were being permanently blacklisted because of their union activities and had therefore been responsible for their not applying immediately for reinstatement (R. 36), and (2) that respondent had deliberately shifted to a "first come, first served" basis for reinstatement of the employees on the list of eleven, without notifying any of the men, only when it discovered that all of the men except the leaders of the union had applied for reinstatement (R. 32).

In his dissenting opinion Judge Garrecht declared (R. 92):

> There is evidence to sustain the findings. The evidence is convincing that the five employees were discharged by the company because of their efforts and prominence in the organization work of the union and with the strike against the company.

It is difficult, within the compass of this brief, to give an adequate impression of the extreme care with which the Board considered every substantial item of the evidence and the contentions made by

respondent. The evidence relied upon by the Board is in large part uncontroverted; where there was conflict the Board relied to a great extent upon the testimony of respondent's officials and of "loyal" employees who had been instrumental in defeating the strike. On this record we think there can be no question that the great weight of the evidence indicates that respondent discriminated against these men because of their union activity.

IV

THE PETITION FOR WRIT OF CERTIORARI WAS FILED WITHIN THE REQUISITE STATUTORY PERIOD

Respondent contends that the petition for writ of certiorari in this case was not filed within ninety days after entry of judgment in the court below, as prescribed by statute (28 U. S. C., sec. 350). The argument, in brief, is that the action of the court below in granting a rehearing was a nullity and that the time within which certiorari must must have been sought is, therefore, to be computed from the date of entry of the original judgment.[25]

The Board's petition for rehearing in the court below was filed within thirty days—as required by

[25] The first judgment of the court below was entered January 11, 1937 (R. 104). The Board petitioned for a rehearing on February 9, 1937, and the petition was granted on May 17, 1937 (R. 105–108, 112). The second judgment was entered October 19, 1937, and, within ninety days after that date, on January 15, 1938, the Board filed its petition for certiorari (R. 124).

the court's rule—after entry of the original judgment denying the Board's petition for enforcement. Respondent contends (1) that, once having denied the Board's petition for enforcement, the court was without any jurisdiction whatsoever under the Act to grant a rehearing, and alternatively (2) that the court lacked jurisdiction because the petition for rehearing filed by the Board did not comply with the court's rules. Each contention is wholly devoid of merit.

A. THE POWER TO GRANT A REHEARING IS INCLUDED WITHIN THE JURISDICTION CONFERRED UPON THE COURT BELOW BY THE ACT

While the Act makes no express provision for rehearing, it vests in the circuit court of appeals "jurisdiction of the proceeding and of the question determined therein." Section 10 (e). The jurisdiction thus conferred clearly does not exclude—in the absence of express statutory provision—the inherent power of a court to correct its own errors on rehearing. See *Bronson* v. *Schulten,* 104 U. S. 410, 415; *United States* v. *Benz,* 282 U. S. 304, 306–307. Particularly is this true in view of the essentially equitable character of the decrees contemplated by the Congress. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 48–49. Thus, the Court doubtless has implied power to remand a case to the Board for further hearings, even where no additional evidence is to be taken. Compare *Helvering* v. *Rankin,* 295 U. S. 123, 131–133. Respondent is

forced to concede (brief in opposition, p. 8) that where the court has entered judgment *enforcing* an order of the Board it retains power over the judgment. Thus, it may cite an employer for contempt, if he violates the order, or presumably, within an appropriate time, may grant a rehearing. That the same power exists to correct an error adverse to the Board is indicated by this Court's action in the *Jones & Laughlin* case. There the Board petitioned for certiorari within ninety days after denial of a petition for rehearing in the circuit court of appeals, but more than ninety days after the original decree was entered. Respondent relies upon a supposed parallel in decisions under the Federal Trade Commission Act. The pertinent decisions under that Act do not support its contention. The circuit courts of appeals have exercised the power to grant rehearings under the Federal Trade Commission Act, just as did the court below under the present Act. *Federal Trade Commission* v. *Bayuk Cigar Co.*, 14 F. T. C. 708 (C. C. A. 3d); *Western Meat Co.* v. *Federal Trade Commission*, 4 F. (2d) 223 (C. C. A. 9th), modified and affirmed, 272 U. S. 554.

B. THE BOARD FILED ITS PETITION FOR REHEARING WITHIN THE TIME REQUIRED BY THE RULES OF THE CIRCUIT COURT OF APPEALS

The judgment of the Circuit Court of Appeals refusing to enforce the Board's order was entered January 11, 1937 (R. 104). On February 9, 29 days later, the Board filed a petition for leave to

adduce additional evidence and for rehearing (R. 105–108). Rule 29 of the Circuit Court of Appeals for the Ninth Circuit provides that "A petition for rehearing may be presented within 30 days after judgment." The Circuit Court of Appeals expressly stated that the petition in this case was "filed within time allowed by rule of court for filing of petition for rehearing" (R. 108).

The Circuit Court of Appeals heard oral argument on this petition on April 23, but postponed decision until after briefs could be filed (R. 108). Subsequently, on May 10, 1937, the Board filed with the court a motion for leave to file a supplement to the petition, together with the proposed supplement, in which it called the court's attention to the decision of this Court in the *Jones & Laughlin* and companion cases, and asked that the rehearing be granted in the light of those decisions (R. 108–111). On May 17 the court granted the petition for rehearing, the court's order reciting that it was based, *inter alia,* "Upon consideration of the petition of National Labor Relations Board, filed February 9, 1937" (R. 112). The court itself thus assumed that it was granting the original petition for rehearing, which was unquestionably filed within the time required by the rules.

Respondent argues that because the prayer in the Board's original petition requested a rehearing only in the event that additional evidence was adduced and new findings made, the court below was not warranted in treating the petition as one for

rehearing. The Board did ask for a rehearing.[26] There is no basis for a contention that the judgment of a court rendered upon rehearing may be assailed as a nullity on the ground that in granting the rehearing the court did not find it necessary to comply with all the conditions presented to the court as the basis for the rehearing—that is, in this case, remanding the case for the taking of oral testimony. Especially is this true where, as here, decisions of this Court have supervened, affording in themselves an independent ground for a rehearing.

C. EVEN WERE ITS RULE NOT COMPLIED WITH, THE COURT BELOW HAD JURISDICTION TO GRANT A REHEARING BEFORE THE EXPIRATION OF THE TERM AT WHICH ITS FIRST JUDGMENT WAS RENDERED

The conclusive answer to respondent's contention, however, is that the rehearing was granted during the term of court at which the original judgment was rendered. It is uniformly recognized, by this Court and the circuit courts of appeals, that when the term has not expired the court has jurisdiction to waive its own rules limiting the time

[26] The opening paragraph of the petition reads (R. 105–106):

"The National Labor Relations Board (hereinafter referred to as the Board) respectfully petitions this Honorable Court for leave to adduce additional evidence and for a rehearing in the above-entitled cause, and for an order directing such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript of the record herein, as provided for in Section 10 (e) of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. Sec. 160)."

within which a rehearing may be applied for. *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25, 40; *Stone* v. *White*, 296 U. S. 596, 550, 298 U. S. 646, 299 U. S. 622, 300 U. S. 643, 301 U. S. 532;[27] *Basset* v. *United States*, 9 Wall. 38; *Irwin* v. *Missouri Valley Bridge & Iron Co.*, 275 U. S. 572; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Unitype Co.* v. *Long*, 149 Fed. 196 (C. C. A. 6th); *Burget* v. *Robinson*, 123 Fed. 262 (C. C. A. 1st); *United States* v. *Harris*, 286 Fed. 910 (C. C. A. 8th); *Omaha Electric Light & Power Co.* v. *City of Omaha*, 216 Fed. 848; *cf. United States* v. *Benz*, 282 U. S. 304, 306; *cf. Foster Bros. Mfg. Co.* v. *National Labor Relations Board*, 90 F. (2d) 948 (C. C. A. 4th).

Where, as here, one of the bases of the request for rehearing is a supervening decision of this Court indicating error in a prior judgment of the Circuit Court of Appeals, the circuit courts of appeals properly grant rehearings so long as the term has not expired. The rule of court fixing the time for filing a petition for rehearing "is entirely for the protection of the court. * * * Being for the protection of the court, clearly it can be waived

[27] In *Stone* v. *White*, *supra*, the petition for certiorari was denied October 14, 1935. 296 U. S. 596. The time for filing a petition for rehearing was extended until December 7, 1936, on which date the petition for rehearing was denied. 299 U. S. 622. On March 11, 1937, 94 days later, but within the same term, a motion for leave to file a new petition for rehearing was filed, and the petition for rehearing was granted on March 15, 1937. 300 U. S. 643.

when justice requires." *Burget* v. *Robinson, supra.* As was stated in *Unitype Co.* v. *Long, supra:*

> The rule which requires a petition to rehear to be filed within 30 days after the filing of an opinion is a rule of convenience, and should not be enforced where the point upon which a rehearing is asked is a reversal of the authority upon which our decision was made after the time for a petition to rehear, but before we had lost jurisdiction over the judgment by the expiration of the term.

CONCLUSION

For the reasons above set forth it is respectfully submitted that the judgment of the court below should be reversed with directions to enforce the order of the Board.

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MARCH 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938